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No. 08-812

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

A-P-A TRANSPORTATION CORPORATION,

Petitioner,

v.

TEAMSTERS LOCAL UNION NO, 560, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the Third Circuit's Opinion did a rigorous analysis of Petitioner's evidence and determined that the "faltering company" exception under the Worker Adjustment Retraining Notification Act, 29 U.S.C. §2102(b)(1) was not available to the Petitioner, where said Opinion does not conflict with any decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Third Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. The Third Circuit properly reversed the Decision of the District Court because there was no dispute as to any material fact, and judgment should have been entered in favor of the Respondents.

RULE 14.1(b) STATEMENT

Respondents are: Teamsters Local Union No. 560, Teamsters Pension Trust Fund of Philadelphia and Vicinity, Teamsters Health & Welfare Fund of Philadelphia and Vicinity, and Teamsters Local 470, and Brian Campbell, *et al.*, a certified class of nonunion employees.

RULE 29.6 CORPORATE DISCLOSURE

None of the Respondents are corporations.

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INTRODUCTION

Petitioner, APA Transport Corp. ("APA" or "Petitioner") has presented no "compelling reasons" for its Petition for a Writ of Certiorari to be granted ("Petition"). *See*, Sup. Ct. R. 10. Petitioner admits that the Third Circuit's August 29, 2008 Opinion ("Opinion") is not in conflict with any decision of this Court or another Court of Appeals (Petition ["Pet."] at 5) or that the Third Circuit's Opinion cited an important federal question that has not been settled by this Court. *See*, Sup. Ct. R. 10(a)-(c). At best, Petitioner limits its argument to a half-hearted attempt to argue that the Third Circuit's Opinion may lead to a conflict in the Circuits at some point in the future. (Pet. at 5). Petitioner has offered no basis to justify granting certiorari, therefore, the Petition for Certiorari should be denied.

APA was a trucking company. On February 20, 2002, APA closed its terminals.

The Worker Adjustment Retraining Notification Act ("WARN Act") provides that covered employers - generally, those that employ at least 100 full-time workers at a single site of employment - must provide sixty (60) days' written notice before a closing or mass layoff. *See*, 29 U.S.C. §2101, *et. seq.* Employers that violate the WARN Act are liable to their employees for back wages and benefits for each day that the notice is not provided, up to a maximum of sixty (60) days. 29 U.S.C. §2104. APA failed to give the proper WARN Act notice before its closure. Respondents filed a Complaint against APA in the United States District Court for the District of New Jersey for Petitioner's

failure to provide the proper WARN Act notice. APA's defense was that it did not have to give the notice because of the "faltering company" exception to the WARN Act. 29 U.S.C. §2102(b)(1).

The matter proceeded through discovery. At the conclusion of discovery, cross-motions for summary judgment were filed.

The District Court gave a short slanted view of the facts and a cursory review of the requirements of the statute concerning the "faltering company" exception and the regulation regarding same. The District Court granted summary judgment in favor of APA. (Petition Appendix ["Pet. App."] 77a-82a).

In contrast, the Third Circuit performed a rigorous analysis of the facts and the requirements that the Petitioner was required to meet in order to be relieved of the WARN requirements under the "faltering company" exception and the related regulations. That court concluded that the undisputed material facts established that the Petitioner had not met its burden under the exception. (Pet. App. 27a-37a).

The Petitioner has filed this Petition because it disagrees with the Third Circuit's findings of fact and conclusion on the merits. That is not sufficient to grant the Petition.

STATEMENT OF THE CASE

APA was a regional trucking company. APA had collective bargaining agreements with local unions, including the Teamsters Local Union No. 560 and Teamsters Local Union No. 470, which were at two (2) different locations. Brian Campbell is a member of the certified class of non-union employees who were affected by APA's closure of its terminals.

On December 19, 1996, APA entered into a Loan and Security Agreement ("Loan Agreement") with TransAmerica Business Capital Corporation ("TransAmerica"). The Loan Agreement had a termination of February 28, 2002. The Loan Agreement provided APA with a revolving credit facility that allowed it to borrow up to $40 Million, secured by property, equipment and accounts receivable. (Pet. App. 5a). The Loan Agreement required APA to provide TransAmerica with regular reports as to its outstanding accounts receivable and to comply with certain financial covenants. (Pet. App. 6a).

Following the execution of the Loan Agreement, APA suffered continual losses in business. (Pet. App. 6a). As a result, APA defaulted on the loan covenants on multiple occasions in 1999, 2000 and 2001. *Id.* After each such default, TransAmerica and APA re-negotiated the Loan Agreement, so that APA's breaches were waived and/or the applicable covenants were amended. *Id.*

APA was negatively affected by the economic conditions following the September 11, 2001 terrorist attacks on the World Trade Center. Those conditions

contributed to an additional thirty (30%) percent decline in APA's revenues. *Id.* The resulting reduction in the value of APA's accounts receivable limited the amount of money which it could continue to borrow from TransAmerica under the Loan Agreement. *Id.*

On October 24, 2001, TransAmerica convened a meeting with APA's officers to discuss how APA was going to operate going forward, "given its losses". *Id.* At that meeting, TransAmerica's President, Steven Fisher, informed APA that TransAmerica would not continue to fund operating losses and would require additional contributions from APA's owners before granting additional loans and extensions. *Id.* APA made no formal request at the October 24, 2001 meeting to secure additional financing or to extend the Loan Agreement. *Id.* at 7a.

In November of 2001, TransAmerica notified APA that it was once again in default of a covenant of the Loan Agreement. On December 10, 2001, TransAmerica agreed to a Fifth Waiver and Amendment to the Loan Agreement to cure the those defaults. *Id.* at 7a. The waiver gave APA additional time to cure its default but was not related to any attempt by APA to obtain additional financing from TransAmerica.

During the period between October 24, 2001 and December 20 or 28, 2001, there were no additional meetings, no telephone conferences, and no correspondence between APA and TransAmerica with respect to possible additional financing. APA made no written proposal or request to TransAmerica to obtain additional financing.

Pursuant to its terms, the Loan Agreement was scheduled to expire on February 28, 2002, at which time the entire loan would be due. *Id.* at 7a. Under the Loan Agreement, APA was required to make any request for extensions or renewal of the Loan Agreement in writing sixty (60) days before the termination date of the Loan Agreement. *Id.* at 7a. Prior to the end of 2001, however, APA had not made any written or oral request to TransAmerica to extend or renew the Loan Agreement. *Id.* at 7a.

On January 2, 2002, APA sent a letter to TransAmerica requesting additional financing for APA, which it proposed would be secured by mortgages on two (2) freight terminals owned by companies related to APA. *Id.* at 7a-8a. That letter did not request an extension or renewal of the Loan Agreement.

On January 15, 2002, a second meeting was held between TransAmerica and APA to discuss the state of APA's finances. *Id.* at 8a. TransAmerica made no commitment with respect to additional financing; nor did it indicate that it would extend the loan beyond its termination date or increase its lending to APA. *Id.* at 8a.

On January 24, 2002, APA again requested an additional loan. *Id.* at 8a. TransAmerica did not respond to that letter. *Id.* at 9a.

On February 13, 2002, TransAmerica sent APA a letter formally notifying it that the Loan Agreement would terminate pursuant to its terms on February 28, 2002 and that TransAmerica would not agree to extend

the Loan Agreement to provide additional financing. *Id.* at 8a. On or about February 14, 2002, APA notified its employees that it would close its terminals effective February 20, 2002. As a result of the shutdown, all of APA's employees were terminated. APA paid no wages or benefits to any employees after February 22, 2002.

Approximately six (6) weeks after the shutdown, an APA-related company lent APA between $10-15 Million Dollars. The loan was secured by an open-ended mortgage and security agreement dated June 5, 2002 on APA's North Bergen, New Jersey terminal facility. *Id.* at 10a.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court or any Court of Appeals nor does it implicate a federal question that has not been decided by the Court. Accordingly, the Petitioner has not carried met its burden of demonstrating any "compelling reasons" for the Petition to be granted. *See*, Sup. Ct. R. 10.

On review by the Third Circuit, legal issues that were decided at summary judgment are reviewed de novo. *TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 199 (3d Cir. 2001).

Contrary to the Petitioner's assertion, the Third Circuit's decision is based on the undisputed material facts, a thorough analysis of the legal requirements of the faltering business exception of the WARN Act and its interpretive regulations. The faltering business

exception to the WARN Act is to be construed narrowly and access to that defense is strictly limited. Contrary to Petitioner's assertion, the Third Circuit's decision does not make the faltering business exception a nullity. The faltering business exception is an affirmative defense to liability, which means that the employer bears the burden of establishing the elements for the faltering business exception. 20 C.F.R. §639.9. The Third Circuit correctly determined that APA failed to meet its burden of proof.

I. The Third Circuit Correctly Determined That The Petitioner Did Not Meet Its Burden Of Proof Concerning The Elements Of The Faltering Company Exception To The Warn Act And Related Regulation.

As a threshold matter, a company seeking to qualify as a "faltering company" must demonstrate that it had inadequate capital to continue functioning and, as such, was in a faltering state. 20 C.F.R. §639.9. (Pet. App. at 28a). Petitioner admits that fact.

The statutory provision states that:

> (a) an employer may order the shutdown of a single site of employment before the conclusion of the sixty (60) day period if as of the time that the notice would have been required the employer was *actively seeking capital or business* which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believes that

> giving a notice required (by the WARN Act) would have precluded the employer from obtaining a needed capital or business.

29 U.S.C. §2102(b)(1) (emphasis added).

The Department of Labor regulations which interpret the "faltering company" exception of WARN break the provision into four (4) required component parts, so that to benefit from the defense an employer must prove: (1) it was actively seeking capital at the time the sixty (60) day notice would have been required, (2) it had a realistic opportunity to obtain the financing sought, (3) the financing would have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown, and (4) the employer reasonably and in good faith believed that the sending of the sixty (60) day notice would have precluded it from obtaining the financing. 20 C.F.R. §639.9(a). (Pet. App. at 28a-29a).

The Respondents conceded Points (3) and (4) above but asserted that APA had failed to meet its burden of proof on points (1) and (2) above. The legislative history of the WARN Act makes clear that the faltering company defense applies only when the employer can demonstrate that all of the above-referenced factors existed sixty (60) days before the closing, at the time when the WARN Act notice was required to be given or shortly before.

According to the Congressional Conference Report issued when Congress passed the WARN Act, the key elements of the defense, which is intended to be a "narrow one" are that: (i) the employer was "actively seeking capital or business"; (ii), if the employer obtained this capital or business, it "would have enabled the employer" to prevent or forestall the shutdown; and (iii), that the employer "reasonably and in good faith believed" that giving the notice required would have precluded the employer from obtaining the necessary capital or business that it had a reasonable opportunity to obtain. Thus, to avail itself of this defense, *an employer must prove the specific steps it had taken, at or shortly before the time notice would have been required,* to obtain a loan, to issue bonds or stocks, or secure new business. This duty to seek capital or business falls on the employer . . . 134 Cong. Rec. S. 8686-01 (1988), *See also, Carpenters District Council v. Dillard Department Stores*, 15 F.3 1275, 1281 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

The legislative history and the regulation makes clear that the critical time when the employer must be taking specific steps to obtain financing capital to secure new business is "*at*" or "*shortly before*" the sixty (60) days prior to the shutdown. *Law v. American Capital Strategies*, Civil No. 3:05-0836, 2007 WL 221671*11 (M.D. Tenn. Jan. 26, 2007); *also see, Local 397, International Union of Electronic, Electrical and Salaried Machine and Furniture Workers, AFL-CIO v. Midwest Fasteners Inc.*, 779 F. Supp. 78, 82 (D. N.J. 1992).

To be "actively seeking capital or business", a company must be "seeking financing or refinancing through the arrangement of loans, the issuance stock, bond or other methods of internally generated financing or the employer must have been seeking additional money, credit or business through any commercially reasonable method". 29 U.S.C. §2102(b)(1), 20 C.F.R. §639.9(a)(1), *American Capital Strategies*, 2007 WL 221671*10; *United Paperworkers International v. Alden Corrugated Container Corp.*, 901 F. Supp. 426, 440-441 (D. Mass. 1995). Although, APA bore the burden of proof, it failed to show that it had taken specific steps at or shortly before the time the WARN Act notice would have been required, to obtain a loan, to issue bonds or stocks, to secure new business, or other internally-generated financing, or to seek additional money, credit or business through any commercially reasonable method. *American Capital Strategies*, 2007 WL 221671*10, *also see*, *In re Old Electralloy Corp.*, 62 BR 121 (W.D. Pa. 1993); *United Paperworkers*, 901 F. Supp. at 440-441.

In this case, with a closure of the terminals on February 20, 2002, APA was required to have given the sixty (60) day's WARN Act notice by December 20, 2001. Petitioner reads the Third Circuit Opinion to indicate that APA had to take specific steps on December 20, 2001. (Pet. App. at 10). That reading is absurd. The Third Circuit indicated that APA had to demonstrate certain steps it took to seek financing by December 20, 2001. The undisputed material facts relied upon by the Third Circuit showed that Petitioner did not take any steps prior to December 20, 2001 to seek additional financing. This determination is consistent with the text of 20 C.F.R. §639.9(a)(1).

The Petitioner argues that the meeting of October 24, 2001 between TransAmerica and APA was a sign that APA was actively seeking financing. (Pet. at 12). To the contrary, at the October 24, 2001 meeting, TransAmerica clearly indicated that it would not continue to fund APA's operating losses and that the owners would have to put additional capital into the company before TransAmerica would extend any additional financing. (Pet. App. at 6a). Contrary to the Petitioner's assertion, the Third Circuit did take into account a statement by a TransAmerica subordinate that options were open. (Pet. App. at 7a). It was also noted that APA did not request additional financing or an extension of the Loan Agreement at the meeting. (Pet. App. at 7a). The Third Circuit also noted that TransAmerica's statements at the October 24, 2001 meeting made APA fully aware that TransAmerica would not provide additional financing, and that as a result the October 24, 2001 meeting did not comply with actively seeking financing requirement within the meaning of 29 U.S.C. §2102(b)(1) and 20 C.F.R. §639.9(a)(1). Moreover, it is undisputed that pursuant to APA's arrangement with TransAmerica, TransAmerica was the only possible source of financing for APA. (Pet. App. at 7a n.3).

There was no evidence of any correspondence or telephone calls to TransAmerica to seek additional financing between the October 24, 2001 meeting and December 20, 2001.

It must be noted that APA's affiliates (who shared common owners with APA) had assets to lend APA as evidenced by their $10-15 Million loan only weeks after the shutdown of APA (Pet. App. 10a). The owners of APA simply chose not to have the affiliates loan any

monies to APA before the WARN Act date for notification. Petitioner asserts that it could not predict what would happen sixty (60) days prior to the closing date. (Pet. at 6) (Pet. App. at 31a). The owners' decision not to have the affiliates loan monies to APA prior to the sixty (60) day notification date prevented APA from getting additional financing from TransAmerica. The owners' decision not to have the affiliates loan APA monies doomed the company to closure and was clearly something APA could have predicted.

The fact that APA got a waiver of default from TransAmerica on or about December 10, 2001 merely stopped the default on the loan. That waiver did not provide any additional capital to APA, nor did it provide any assurances that additional capital would be available. While the waiver indicates that TransAmerica gave APA additional time to pay its debts, it does not indicate that APA was actively seeking financing prior to the sixty (60) day notification date, as required by 20 C.F.R. §639.9(a)(1). TransAmerica was clearly aware that APA's affiliates were able to provide the necessary capital to extend the loan. In fact, TransAmerica suggested such a transfer to APA during the October 24, 2001 meeting. APA's owners simply decided not to provide those funds until shortly after the shutdown and the subsequent expiration of the Loan Agreement.

The fact that TransAmerica failed to give sixty (60) days' written notice prior to the Loan Agreement termination date confirmed that monies due under the Loan Agreement would be due in total on that date, and doomed the company to closure because APA would be left with no financing after that date.

APA's first attempt to get additional financing was on January 2, 2002 and as the Third Circuit found, that was too little and too late.

As argued previously, Petitioner makes no argument of any legal issues but instead tries to find fault with the Third Circuit's findings and interpretation of 29 U.S.C. §2102(b)(1) and 20 C.F.R. §639.9(a)(1). This Court must conclude that the Third Circuit's Opinion is consistent with the statutory and regulatory language and the Petition for Certiorari should not be granted.

II. The Third Circuit Properly Reversed The Decision Of The District Court Since There Was No Dispute As To Any Material Facts And Judgment Should Have Been Entered In Favor Of The Respondents.

The Petitioner asserts that the Third Circuit applied the wrong legal standard in reversing the Decision of the District Court (Pet. at 19). This assertion overlooks the legal standard applied by the Third Circuit, that legal issues decided at summary judgment are reviewed *de novo. TKR Cable Comp., supra.*

In this case, the factors concerning actively seeking financing have been conceded by the Petitioner in that the only steps it took were: (1) the meeting of October 24, 2001; (2) the waiver of the default on December 10, 2001; and (3) the request for additional financing with the tender of two properties on January 2, 2002. (Pet. at 12).

Essentially, the Petitioner argues that it believed that TransAmerica would extend additional financing and would extend the Loan Agreement simply because of its long-term relationship. (Pet. at 13, 20). That argument ignores the fact that in late 2000 and continuing into May of 2001, APA had negotiated a Fourth Amendment to the Loan Agreement with TransAmerica so that TransAmerica would provide additional financing. This Fourth Amendment required extensive documentation and extensive negotiations, which finally led TransAmerica to provide APA with an additional $4.7 Million solely to pay down the credit limit with TransAmerica to comply with the covenants of the Loan Agreement. Moreover, in order to obtain the loan, APA's owners and affiliate had to pledge $8.3 Million to get financing of $4.7 Million.

It is clear from the record that for the period of October 24, 2001 through the date the WARN notice was required on December 20, 2001, APA took no steps remotely similar to those it took in the negotiations to get additional financing in the Spring of 2001.

Again, it was also undisputed that TransAmerica was APA's only source of financing and there was no evidence put into the record to show any steps that APA took to get additional financing from TransAmerica in the period prior to December 20, 2001. The Third Circuit correctly determined that judgment should be entered in favor of the Respondents.

The Petitioner argues that the Third Circuit erred in not remanding the matter for trial or hearing so to better develop the record or consider additional testimony and other evidence "not previously reviewed." (Pet. at 20-22). This argument overlooks the fact APA was a movant on summary judgment and was obligated to present all evidence and highlight material and relevant facts in its argument. The Petitioner is not entitled to a second opportunity to present evidence and argument not raised in the district court.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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